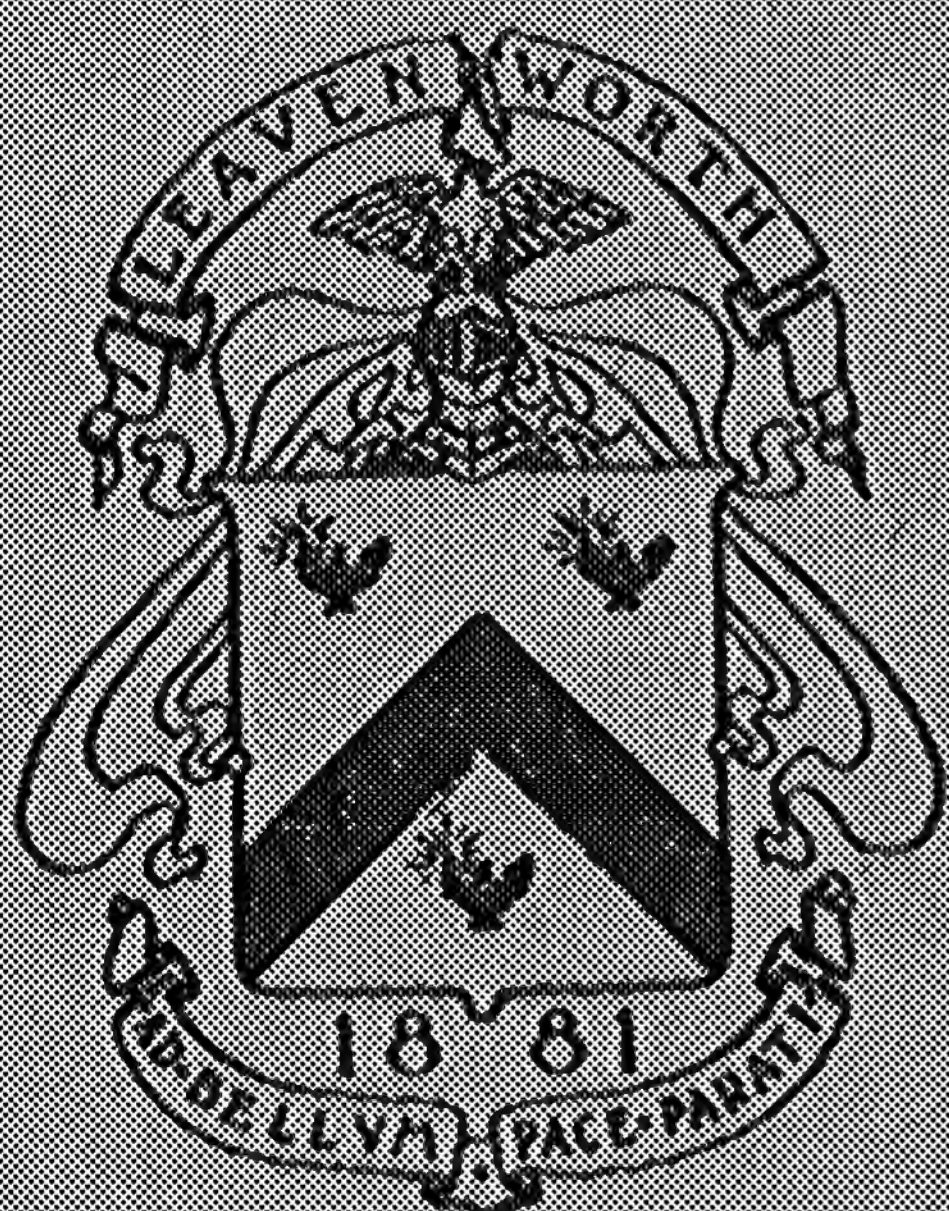


# **Law of Negotiable Instruments**

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## **LAW OF NEGOTIABLE INSTRUMENTS**

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### **Origin of the "Law Merchant"**

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The idea of negotiability as applied to modern business affairs is a product of commercial intercourse. Indeed, without this principle, or some equivalent which the wit of man might have devised, it is safe to say that the world's commerce and consequently its civilization would have been greatly retarded.

An interchange of commodities leads to an interchange of ideas. An interchange of ideas quickens the pulse of civilization and increases the demand for the necessities and luxuries of life. This in turn quickens commercial activity and the world's civilization moves on step by step. The doctrine or idea of negotiability as applied to certain legal documents has been and still is one of the salient factors in this movement. It has crossed the frontiers of nations and brought men of different countries and of different races into contact, breaking down the barriers of prejudice and opening channels of trade and traffic.

In the earlier stages of society when man was yet in a savage nomadic state and generally at war with all the world beyond his own tribe, commerce was of necessity limited to a narrow sphere and to the exchange, or barter, of the rude articles which savage ingenuity could devise. The advent of agriculture led to the foundation of communities with fixed habitations. Tribal barriers were removed and nations were formed. Manufacturing followed, leading to demands for distant products. The exchange of commodities, however, article for article, was



difficult and burdensome. This rendered apparent the necessity for some medium of exchange, some representative of value, that would pass current in commercial centers. Gold and silver satisfied this requirement and early became the recognized mediums of exchange or standards of value. This was a long step in advance, but commerce was still barnacled with many difficulties that were overcome only with the slow progress of centuries. Piracy at sea and robbery on land, racial jealousy, universal warfare, and tedious communications were obstacles not lightly brushed aside and rendered commercial enterprises dangerous in the extreme.

Naturally those engaged in traffic, especially at sea, would seek to secure the acceptance of rules that would afford some protection to their undertakings. These efforts were first manifested in the "Sea Laws" of the Mediterranean cities which, lying in the track of oriental trade, constituted during the middle ages the great commercial centers of the world.

One of the features growing out of these crude maritime regulations was what came to be known as the law-merchant (*lex mercatoria*), comprising those usages of trade which merchants regarded as binding in commercial transactions. <sup>1</sup>Blackstone states that the law-merchant is a branch of the law of nations, and that it has been grafted into and made

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NOTE.—On account of the frequency with which army officers are called upon to handle commercial paper, not only on their own account, but for the government as well, it has been thought advisable to present the most necessary features of the law on that subject in the form of a printed lecture which will serve as a means of ready reference.

<sup>1</sup>Chase's Blackstone, 880. He says, "In mercantile questions, such as bills of exchange and the like: in all marine causes, relating to freight, average, demurrage, insurances, bottomry, and others of a similar nature; the law-merchant, which is a branch of the law of nations, is regularly and constantly adhered to."



a part of the common law, being allowed, for the benefit of trade, to be of the utmost validity in all commercial transactions. <sup>2</sup>And even though they may have been unknown to Blackstone usages of trade and commerce are acknowledged by courts to be a part of the common law, <sup>3</sup> though of more universal authority. <sup>4</sup>

It is not easy to say when the law-merchant came to be recognized as a part of the common law. It is referred to in the Magna Charta and also in the statutes of the Plantagenets and Tudors. <sup>5</sup> It was, however, in the time of Blackstone fully regarded as a part of the common law. For some time a distinction was maintained between foreign and domestic mercantile contracts, the former being construed according to the "usages of trade" or law of merchants, the latter according to the ordinary law of contracts. The construction applicable to the law-merchant was afterwards extended to local transaction when merchants were parties, those engaged in other avocations or trades still being excluded. Finally, in 1666, the courts declared "That the law of merchants is the law of the land, and the custom is good enough generally for any man without naming him merchant." <sup>6</sup>

Mention has already been made of the great advantage to civilization resulting from the adoption of a medium of exchange which made possible the pur-

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<sup>2</sup>Id. 41.

<sup>3</sup>*Mercer vs. Hackett*, 1 Wall. 83; and see further on this subject *Merchant's Bank vs. State Bank*, 10 Wall. 651; and *Woodbury vs. Roberts*, 59 Iowa, 349. In this latter case it was said, "The rules applicable to commercial paper were transplanted into the common law from the law merchant. They had their origin in the customs and course of business of merchants and bankers, and are now recognized by the wants and convenience of the mercantile world."

<sup>4</sup>*Randolph's Com. Paper*, Sec. 1.

<sup>5</sup>*Norton's Handbook*, 3d Edition, p. 2.

<sup>6</sup>Id.



chase of commodities without an actual exchange of goods. But the perils of the sea and of the road rendered the shipment of gold or silver unsafe. Some means of discharging an indebtedness at a distance without always making an actual remittance of money or a transfer of goods was plainly necessary, and this the "usages of trade" soon supplied. It is probable that Rome had not long been mistress of the Mediterranean when this necessity became manifest and the *bill of exchange*, or something analogous thereto, had been devised to meet it. Nevertheless the origin and early history of this simple commercial expedient are involved in obscurity.

### The Bill of Exchange

Chancellor Kent is of the opinion that the bill of exchange was known to the ancient Greeks.<sup>7</sup> But according to Story the medium of exchange employed by the ancients differed in form and purpose from those now in use.<sup>8</sup> The nearest approach was the custom which prevailed at Rome where one paid money to another in that city to be repaid by the latter at another place. This contract is mentioned by Cicero and a like contract is supposed to be referred to in the Pandects. Other writers assert that there is no vestige of our contract of exchange to be found in the Roman Law.<sup>9</sup> However this may be, with the downfall of the Western Roman Empire and the advent of the Dark Ages commerce declined and for centuries there was little call for contracts of this character. But with the revival of commerce consequent upon the Crusades and the general awakening at that time they gradually came into use and ere long the bill of exchange was a well recognized feature of the commercial world.

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<sup>7</sup>3 Com. Sec. 44.

<sup>8</sup>Bills of Exchange 6, 4th Ed.

<sup>9</sup>Id. 7.



According to Hallam<sup>10</sup> the merchants of Lombardy and the south of France took up the business of remitting money by bills of exchange and making profits on loans in the early part of the 13th century, and within the next two centuries this method of remitting money came into general use throughout Europe.

It is also probable that the chief characteristic of the bill of exchange—negotiability—was a product of this revival of trade and commerce.<sup>11</sup> But when once established this principle became a potent factor in the growth of commerce itself.

Being a product of international commerce the attributes of the bill of exchange were at first restricted to foreign bills, that is, to those the parties to which resided in different countries. But the merits being so apparent the inland bill soon came into use, first upon the continent and afterwards in England. Here, however, they were at first very much restricted, but the restrictions gradually wore away and now foreign and inland bills, both in England and America, stand very much on the same footing. This difference, however, still remains: To charge the responsible party in case of dishonor *protest* is required for foreign bills, while for inland bills simple notice either verbal or in writing will be sufficient. In the United States the general rule is that the States are “foreign” as far as negotiable instruments are concerned.

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<sup>10</sup>Middle Ages, Chap. IX, Part II, Money Dealings of the Jews.

<sup>11</sup> Id. There were three species of paper credit in the dealings of the merchants: 1—General letters of credit not addressed to anyone and not uncommon in the Levant. 2—Orders to pay money to a particular person. 3—Bills of exchange regularly negotiable. By the year 1400 bills were drawn in sets and worded exactly as at present.



### **The Promissory Note**

Instruments in the form of promises to pay must have existed from the earliest times. Credit is essential in all business transactions, but ordinary prudence would require some evidence to show that credit had been given, or that a parol contract existed. This led to the promissory note, an instrument at first unnegotiable, but afterwards (in England) having the attribute of negotiability conferred upon it by virtue of a statute known as the Statute of Anne<sup>1 2</sup>

It seems that the promissory note had been within the "usages of trade" before the passage of this act, probably circulating in the light of an inland bill of exchange drawn by a man upon himself and accepted at the time of drawing.<sup>1 3</sup> By a decision of Lord Holt, however, this attribute was taken away and the Statute of Anne became necessary to restore it.

Bills of exchange and promissory notes are, par excellence, negotiable instruments, but as commercial transactions are greatly facilitated by the use of such instruments the tendency is to extend the principle of negotiability to other securities or evidences of indebtedness. Thus the check has taken its place among negotiable instruments and is now a marked feature of the commercial world.

### **The Check**

The check is in the nature of a bill of exchange drawn on a bank or banker and payable on demand. It is, however, a distinct commercial instrument though subject to the same rules in regard to transfer, indorsement, and negotiability. The chief points of difference will be referred to later on.

As a matter of course the law of negotiable in-

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<sup>1 2</sup>Enacted in 1705.

<sup>1 3</sup>Norton's Handbook, 3d Edition, p. 3.



struments has changed and is still changing with the evolution of commerce and of legal science. Each country has a jurisprudence peculiar to itself and in the United States this is to a greater or less degree true of the States that compose the Union. Nevertheless the fundamental principles pertaining to the doctrine of negotiability are substantially the same and will now be briefly pointed out.

### **Assignability and Negotiability**

By assignability is meant that quality or attribute by means of which property or rights evidenced by contracts may be transferred from one person to another. It pertains to contracts in general. In this class of transfers the assignee takes whatever is transferred subject to the equities of assignment. That is, the assignee takes no better title than that possessed by the assignor, nor is his title complete as against the debtor until the latter has been notified of the transfer. Moreover, except in case of specialties, the consideration must be expressed. But negotiable contracts have always been excepted from this rule and pass from hand to hand so as to give the holder who is without notice of prior equities an absolute title free from the equities of assignment. Nor need the consideration be expressed, the law implying a consideration sufficient to support the contract.<sup>14</sup>

This freedom from the restrictions that accompany the assignment of ordinary choses in action is, in fact, what the term negotiability<sup>15</sup> implies, its purpose and office being to facilitate trade by furnishing a kind of money based upon the credit of individuals.

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<sup>14</sup>This, however, is a presumption and may be rebutted.

<sup>15</sup>Latin—Negotiare—to do business.



In order, however, for a contract to fulfill these conditions—that is, to be negotiable—it must possess the following properties:<sup>16</sup>

1. It must be in writing and for the payment of a certain sum of money.

2. The sum ordered (bill, check), or promised (note), to be paid must be payable absolutely and unconditionally.

3. It must contain on its face the “indicia of negotiability”, “to order”, or “to bearer”.<sup>17</sup>

4. It must be delivered.

Negotiability pertains to a particular class of contracts only, the bill of exchange, promissory note, and check being the most common and of the greatest importance in commercial transactions. But if any instrument fulfills the above conditions it will be negotiable and the holder will be the owner until the contrary is shown. When the instrument provides for interest it runs from date, if no other time is fixed. If no interest is mentioned it begins at maturity, the legal rate being presumed.<sup>18</sup>

Sometimes bills of exchange are accepted or promissory notes given without any consideration for the purpose of enabling a person to raise money on credit. Such instruments are called *accommodation paper* and are an exception to the rule that the purchaser of a negotiable instrument in order to acquire a complete title must be a purchaser for value without notice, for such paper can be legally sold though the purchaser have notice that no consideration passed between the original parties. This

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<sup>16</sup>Walker's American Law, 10th Ed., 522; Norton's Handbook, 3d Ed., 26.

<sup>17</sup>See also statute requirements in the various states.

<sup>18</sup>The rule of certainty as to the amount of money specified in negotiable instruments does not preclude such instruments drawing interest, nor prevent an increase of interest if the obligation is not paid at maturity.



is a rule of the law-merchant and illustrates how usage may become crystallized into law.

## Forms of Bills, Notes and Checks

### Foreign Bill of Exchange

£500.00.

ST. LOUIS, Mo., U.S.A., Nov. 1, 1904.

Thirty Days after sight of this First of Exchange  
(Second and Third being unpaid) pay to the order of  
John Doe (payee) Five Hundred Pounds sterling, for  
value received, and charge the same to the account of

RICHARD ROE (*drawer*).

To Henry Stiles & Co. (*drawee*)

London, England.

To prevent delay from loss international foreign bills of exchange are usually drawn in sets of three, each bill containing a condition that it should be payable provided the others remain unpaid.

### Inland Bill of Exchange

\$500.00.

KANSAS CITY, Mo., Nov. 1, 1904.

Thirty days after sight pay to the order of  
John Doe (*payee*) Five Hundred Dollars, value received,  
and charge to the account of

To James Allison, (*drawee*)

Security Building,

St. Louis, Mo.



### Promissory Note

\$500.00.

LEAVENWORTH, KANSAS, Nov. 1, 1904.

Thirty days after date for value received I promise to pay John Doe (*payee*) or order, the sum of Five Hundred Dollars, at the First National Bank.

RICHARD ROE (*maker*).

### Check

No. .... LEAVENWORTH, KANSAS, Nov. 1, 1904.

THE FIRST NATIONAL BANK (*drawee*)  
Of Leavenworth.

Pay to John Doe (*payee*) or order .....\$500.00

Five Hundred .....Dollars.

RICHARD ROE (*drawer*).

Though customarily used the words “value received” are not essential to the validity of a negotiable instrument. It will be noticed that the bill of exchange and check are orders to pay while the note is a promise.

The requirement that a negotiable instrument shall be in writing does not mean that it must be written with a pen or pencil, but that the instrument must be impressed by characters upon some substance (usually paper). Printed notes are often used, and comply fully with the above requirement.

The legal designations of parties to the above instruments are shown in parentheses. The person in lawful possession of a negotiable instrument is called the holder. He may be the payee, indorsee, or bearer.



A *bill of exchange* may be defined as an unconditional order in writing by one person upon another for the payment of a certain sum of money absolutely and at all events. Among merchants a bill of exchange is usually called a “draft”. When accepted it is called an “acceptance”.

### Acceptance of Bills of Exchange

An instrument to be negotiable must be payable absolutely and unconditionally. This requires that there shall be a date, certain to arrive, upon which the instrument will mature or become due. Therefore a bill of exchange payable *at or after sight*, or *after demand*, or *after any other uncertain event*, must be presented to the drawee for acceptance. That is, it must be presented to him to determine whether or not he will honor it. If he accepts, the date of maturity is fixed. Should acceptance be refused the bill is at once dishonored.

Bills payable as above must be presented for acceptance<sup>20</sup> within a reasonable time. What is reasonable time will depend upon circumstances.

If the drawee is dead the presentment is made to his representative.

The acceptance may be oral but is usually in writing on the face of the bill as shown in the forms. Any words indicating an acceptance—that is, a promise to pay the bill when due, will be sufficient. A promise to accept will be equivalent to acceptance if it has given credit to the bill.

Bills payable on demand, or at a given time after date, need not be presented for acceptance. Their maturity is already fixed. Bills payable on demand must be presented for payment within a reasonable time.

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<sup>20</sup> Twenty-four hours are usually allowed the drawee in which to accept, the acceptance, however, dating from the time of presentment.



The reason that bills payable “at sight” must be presented for acceptance is that the words “at sight” are regarded as equivalent to the words “upon acceptance”, and therefore such bills do not become due until accepted. They are then entitled to the usual days of grace.<sup>21</sup>

A *promissory note* is an unconditional promise in writing, signed, but not sealed by the maker, to pay a certain sum of money absolutely and at all events, either to the bearer or to a person named therein, or to the latter’s order.

Promissory notes, depending upon the way they are written and signed, may be classed as follows: (1) several, (2) joint, (3) joint and several.

The several note has only one maker. A joint note has two or more persons as makers and is written, “*we promise,*” etc. Here the obligation is joint, and if the holder sues he must sue all the makers together. A joint and several note is written, “*we jointly and severally promise,*” or “*I promise,*” and is signed by two or more persons. The holder in this case can sue any one or all the makers as he pleases. In some States statutes make all notes signed by more than one person joint and several.

When the payee of a note has indorsed it to a third person the note is virtually converted into a bill. John Doe, the indorser of the note, corresponds to the drawer of the bill; the maker of the note to the acceptor of the bill. The liabilities of these assimilated parties are also identical. The maker of the note and the acceptor of the bill are the parties first liable to the holder. If these parties fail to pay, the indorser of the note and the drawer of the bill become liable.

A mere memorandum of indebtedness without a promise to pay is not a promissory note. For ex-

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<sup>21</sup>See the statute law of the various states.



ample, "I. O. U. \$500.00," "Due A \$500.00," or "I acknowledge the within claim to be true," are evidences of indebtedness only, contain no promise, and are not therefore promissory notes.<sup>22</sup>

A *check* is a draft or order on a bank or banker, purporting to be drawn on a deposit of funds, for the unconditional payment on demand of a certain sum of money either to bearer, or to a person named therein, or to the latter's order.

The chief points of difference between a bill of exchange and a check are the following: A check is always drawn on a bank or banker; no days of grace are allowed; the drawer is not discharged by the *laches* of the holder on presentment for payment unless he can show that he has sustained some injury by the default; it is not due until payment is demanded, and the statute of limitation runs only from that time; it is not necessary that the drawer of a bill should have funds in the hands of the drawee: a check in such a case would be a *fraud*.<sup>23</sup>

Where checks or other negotiable instruments are made payable to a fictitious person they are generally regarded as payable to bearer.<sup>24</sup>

### Certified Checks

By certification of a check is meant the act by which the bank admits the check to be good. No particular words are necessary though certification is generally made by the proper bank official writing "good," or something equivalent on the face of the check. By this act the bank acknowledges the genuineness of the drawer's signature, that the bank has sufficient funds of the drawer to meet the check, and obligates itself to retain these funds for that pur-

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<sup>22</sup> Norton's Handbook, 3d Ed., p. 29.

<sup>23</sup> Merchants' Bank vs. State Bank, 10 Wall. 604-697; Bull vs. Bank of Carson, 123 U. S. 105-110.

<sup>24</sup> Norton's Handbook, 3d Ed., p. 54.



pose.<sup>25</sup> A certified check is similar to a note of the bank payable on demand. Each is intended to circulate as money, and each is an absolute promise to pay a specific sum upon demand.<sup>26</sup>

Delay in presenting a *certified* check does not discharge the bank from its obligation. The demand may be made whenever it suits the convenience of the party entitled to the stipulated payment.

### Transfer of Negotiable Instruments: Indorsement

To constitute a medium of exchange negotiable instruments must be readily transferable from one person to another. This attribute they have, the transfer being effected by *indorsement* if the contract is payable to order, or by simple delivery if payable to bearer. A complete title passes in either case<sup>27</sup>

To be able to enforce rights therein the holder of a negotiable instrument must be a *bona fide* holder for value. A thief may, however, transfer for value a negotiable instrument that he has stolen and thereby convey a valid title. So also may the finder of a negotiable instrument that has been lost.

By indorsement is meant the writing of the name of the indorser on the instrument with the intent either to transfer the title to the same, or to strengthen the security of the holder by assuming a contingent liability for its future payment, or both.

Indorsements may be as follows:

1. In blank—signature only—*John Doe*. Title passes by mere delivery.

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<sup>25</sup> In New York, however, it has been held that the certification does not extend to the amount named in the check nor to the payee thereof. *National Bank vs. National City Bank*, 59 N. Y. 57.

<sup>26</sup> Norton's Handbook, 3d Ed., p. 422.

<sup>27</sup> Negotiable instruments may be assigned like any other contract. They may also be transferred by operation of law as when the holder dies.



2. In full (special)—indorsee named: Pay to A; pay to the order of A; pay to A or order—*John Doe*. Title can pass only when A himself indorses the instrument.<sup>28</sup>
3. In full restrictive—payment to indorsee only; Pay to A only; pay to A for me; pay to my servant for my use—*John Doe*. This indorsement prohibits further negotiation and makes the indorsee an agent for collection.

In the indorsement, "Pay to A for the use of B," the title passes to A, but he holds the instrument in trust for B and can only negotiate it subject to that trust.

4. Conditional indorsement: Pay to A or order if he arrives at 21; pay to A or order unless before payment I give notice to the contrary—*John Doe*. Title does not pass unless the condition is fulfilled.
5. Without recourse: Pay to A without recourse, or sans recourse; pay to A at the indorsee's own risk—*John Doe*. This means that the indorser exempts himself from liability to indemnify the holder should the bill or note be dishonored.<sup>29</sup>

This transfer is, however, a sale and the transferror without recourse, like the seller of a chattel, warrants his title to the instrument and the genuineness of the latter. That is, he guarantees that he has a good title and that the instrument is neither forged, fictitious, nor altered.<sup>30</sup>

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<sup>28</sup>In making indorsements of this class, especially on government checks, the indorser should exercise care to sign his name as it is written in the previous indorsement or on the face of the instrument.

<sup>29</sup>Norton's Handbook, 3d Ed., p. 119 et seq.

<sup>30</sup>Id. 167.



6. Waiver: Notice of dishonor may be waived by an indorser writing words to that effect over his signature, thus: Notice waived; demand and notice waived; protest waived, or protest and notice waived—*John Doe*.

### **Maturity of Negotiable Instruments<sup>31</sup>**

A negotiable instrument should be presented for payment on the day it becomes due. It may be payable a given time after date; at, or a given time after, demand; or at, or a given time after, sight. "Sight" applies only to bills and refers to the time of presentation for acceptance, the maturity being determined by the date of acceptance.

To charge the drawer and indorsers, presentment for acceptance or for payment, as the case may be, followed in case of refusal by notice of dishonor, is necessary. A bill, note, or check is presented by exhibiting it and requesting its acceptance or payment. The holder must first seek payment from the parties primarily liable. That is, from the acceptor of a bill of exchange, the maker of a promissory note, and the drawee of a check. If they do not pay then the holder must take the necessary legal steps to charge the parties secondarily liable; that is, the drawer and indorsers in case of bills and checks, and the indorsers in case of notes. Presentment must be made by the lawful holder or his authorized agent.

A failure to make due presentment for *acceptance*, where acceptance is necessary, deprives the holder of his remedy both on the bill itself and on the consideration for which it was given.

A failure to present a bill or note for *payment* at the proper time and place—

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<sup>31</sup> Norton's Handbook, 3d Ed., p. 366 et seq.



- (1) Relieves the acceptor or maker from payment of further interest and costs of suit (if he were ready to pay at the proper time and place) but not from payment of principal sum, liability for which continues until paid or outlawed.
- (2) It discharges the drawer and indorsers from further liability.

Negotiable instruments not payable on demand are entitled to *days of grace*,<sup>32</sup> generally three, which are added to the nominal time of payment. When no time of payment is specified the instrument is regarded as payable on demand.

Checks<sup>33</sup> are payable on demand. But the drawer of a check is not discharged from his obligation by unreasonable delay in presentment of the check for payment, or in giving him notice of dishonor, unless he has been actually prejudiced thereby; but if the drawer has suffered a loss thereby as when a bank fails, he is discharged to the extent of his loss.

Checks should be presented for payment within a reasonable time. The following rules are safe:

If the holder and banker are in the same place the check should be presented within one business day after its receipt.

If they are in different places the check must be forwarded for presentment within one business day after its receipt, and must be presented to the banker within one business day after its arrival at the place where the banker is located.

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<sup>32</sup> Days of grace have been abolished in some of the States.

<sup>33</sup> In some States checks drawn on a banker in another State are regarded as foreign bills of exchange and treated accordingly.



## DISHONOR OF NEGOTIABLE INSTRUMENTS:

### Notice

A negotiable instrument is dishonored when acceptance or payment, as the case may be, is refused, acceptance or payment being legally required.

When an instrument is dishonored notice of that fact must be given—in case of a bill or check, to the drawer and indorsers; in case of a note, to the indorsers. Otherwise they are discharged.

*Notice of dishonor*, unless a writing is required, may be verbal and should be given immediately after dishonor, the law allowing a reasonable time, determined by the “usual course of business,” to reach all the parties whom it is sought to charge. Where the parties all reside in the same place the drawer and indorsers must be notified not later than the next business day. If they live in different places, notice must be deposited in the post office so as to be taken by the mail leaving within that time. A failure to comply with these rules relieves the drawer and indorsers from liability. If the holder is willing to rely upon the indorser immediately preceding himself notice to this indorser alone will be sufficient. It is better and safer, however, to notify all parties liable. Each indorser has 24 hours, or one business day, in which to notify the indorser preceding him.

In case of foreign bills of exchange *protest* is required. Protest is a written declaration by a notary, under a copy of the instrument dishonored, that acceptance or payment has been refused. Generally, the notary takes all the steps, presentment, demand, and giving notice, necessary to fix the liability of the drawer or indorsers. These steps are set forth in a certificate under seal, which certificate is generally accepted as evidence of the facts set forth and thus obviates the necessity of calling witnesses. It is common to protest all dishonored negotiable instru-



ments in the manner described above, and foreign promissory notes when indorsed should be protested as they are then practically bills of exchange.

The requirement of notice, or of protest and notice, may be waived by a statement to that effect on the face of the instrument.

This is frequently done and all parties who indorse such paper are then bound by this additional agreement.

### **The Contract in Negotiable Instruments**

The contract of the maker of a promissory note is indicated in the instrument.

The contract of a drawer is virtually that of an indorser.

The contract of an indorser is that he will pay the sum named in the paper upon the following conditions precedent:

1. Where presentment is for payment or acceptance (acceptance being necessary).

Foreign Bill—(a) Due presentment and demand;

(b) Due protest; (c) Due notice of dishonor.

Inland Bill—(a) Due presentment and demand;

(b) Due notice of dishonor.

Check—Same as inland bill unless regarded as a foreign bill in which case protest will also be required.

2. Where presentment is for acceptance and acceptance is not necessary—

Foreign Bill—(a) Due protest; (b) Due notice of dishonor.

Inland Bill—Due notice of dishonor.

This contract of an indorser is an implied contract resulting from the negotiable character of the



instrument. But the transfer of such an instrument is a sale thereof, and the seller is, in addition, bound by the implied warranties of title and of the genuineness of the instrument as has already been shown in the case of an indorsement without recourse.

After maturity the instrument loses its character of negotiability and a purchaser at that time takes the title of his assignor. But a demand note is negotiable for a reasonable time after its date.

### **Payment by Negotiable Instruments**

Generally a negotiable instrument given for a debt does not discharge it unless by agreement of the parties. But a negotiable instrument made by a third person and given without indorsement for a contemporaneous debt discharges the debt unless the contrary be expressly proved. If, however, a negotiable instrument made by a third person be indorsed for a contemporaneous debt, or given without indorsement for a precedent debt, the debt is not discharged. But the above rules are presumptions merely and may be varied by express agreement between the parties. In some states, however, when a note or bill is given on account of indebtedness payment of the debt is presumed until the contrary is shown. Generally negotiable paper received as collateral security for a pre-existing debt is regarded as taken for value.<sup>34</sup>

### **What Law Governs? Conflict of Laws**

Negotiable instruments may be issued in one jurisdiction, indorsed in another, and payable in a third. Their construction and interpretation, therefore, are liable to be governed by different laws and it then becomes important to determine which law governs.

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<sup>34</sup>Norton's Handbook, 3d Ed., p. 311. Contra in New York; *ib.*, p. 312.



The *validity* of a contract is generally determined by the law where the contract is made. If valid there it will be valid everywhere. If not usurious there it is not usurious anywhere. The contracts of the drawer, acceptor, and indorsers are all different and their validity will be determined by the law of the place where made.

The interpretation and binding force of contracts are determined by the law of the place where the contract is to be executed. That is, the law of the place of performance governs. The rate of interest payable as damages is also determined by this law.

The law of the place where suit is brought for breach governs the remedy, form of action, etc.

### Defenses

A party to a negotiable instrument may interpose certain defenses in a suit brought by a holder against him, among which are the following:

1. Infancy. In this case the contract is voidable, not void.
2. Coverture. At common law a negotiable instrument made by a married woman was void. This rule has been changed in many states.
3. Statutes. Statutes may void instruments by declaring certain contracts void, or annexing a penalty to the performance of the act for which the instrument is given.
4. Material alterations.

It is doubtful whether insanity or complete intoxication is a defense against a holder for value without notice; but *ultra vires* is not a defense. Nor is the fact that the instrument was obtained through fraud or duress, or that there is a failure of consideration, or that payment has been made, a de-



fense against a purchaser before maturity, for value and without notice.

If alterations are innocently made recovery can be had upon the original consideration. Forgery of a negotiable instrument, or of an indorsement thereon, except in case of ratification or estoppel, nullifies the instrument as to all parties against whom the forgery is committed. In case of forgery the payor can recover of the payee claiming through forgery, the recovery being based upon the warranty. But forgery does not destroy the title of the true owner of the instrument, nor the right to collect it. If the forgery consists in raising the amount, the maker or drawer can be held only for the original sum, unless through his carelessness he has made the forgery possible. If he writes with a pencil that can be easily erased, or leaves a blank space whereby the amount can be raised, he can be held responsible for the loss.

### **Other Instruments Possessing Attributes of Negotiability**

“A *coupon bond* is an instrument complete in itself, and yet composed of several distinct instruments each of which is in itself as complete as the whole taken together. As originally issued the coupon bond consists of (1) an obligation to pay a certain sum of money at a future day; and (2) annexed to it is a series of coupons, each of which is a promise for the payment of a periodical installment of interest.”<sup>35</sup> Coupon bonds containing the usual properties of negotiability are negotiable and have the qualities of commercial paper. The coupons are written contracts for the payment of a certain sum of money as interest and so drawn that they may be

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<sup>35</sup>Daniel's Negotiable Instruments, Sec. 1488. 144 U. S. 610.



separated from the bond. They are negotiable and suit may be maintained upon them without producing the bond to which they belong.<sup>3 6</sup>

A *certificate of deposit* is a written acknowledgment of a bank or banker of the receipt of a certain sum of money from a certain person upon deposit, and is generally framed in such a form as to constitute a promissory note.

Bills of lading have been called *quasi* negotiable instruments. They do not, however, possess all the properties that are requisite in negotiable instruments.

For the same reason ware-house receipts and certificates of stock cannot be considered as negotiable instruments.

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<sup>3 6</sup> Aurora City vs. West, 7 Wall. 82.